No. 76-1072

In the Supreme Court of the United States

OCTOBER TERM, 1976

DANIEL VALERIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The oral opinion of the court of appeals was not recorded. The opinions of the district court (Pet. App. 1a, 16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1977. The petition for a writ of certiorari was filed on February 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a separate court order is required before the government may use a pen register in conjunction with a court authorized wire interception.

2. Whether 18 U.S.C. 2518(8)(d) permits a district court to postpone the time for service of inventory notice beyond 90 days, on a showing of good cause.

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of conspiring to conduct and conducting an illegal gambling business, in violation of 18 U.S.C. 371 and 1955. He was sentenced to two years' imprisonment on the substantive offense; his two year sentence on the conspiracy offense was suspended in favor of four years' probation. The court of appeals affirmed in an unrecorded oral opinion (Pet. 1-2).

The undisputed evidence shows that petitioner was a partner in a large numbers business and maintained the books for the operation (Tr. 692, 697, 743). Evidence of this illegal gambling business was derived primarily from a wire interception authorized by District Judge Murphy on January 15, 1973 (Govt. C.A. App. 21). The order authorized the monitoring of two telephones for a maximum of 15 days (*id.* at 24). The wire interception was conducted from January 16, 1973, to January 27, 1973, and in addition pen registers (devices that show the numbers dialed on the monitored telephones) were used on the two telephones during that period. On July 10, 1973, after two court-authorized postponements, inventory notice was served upon petitioner and others (Pet. 7, 8).

ARGUMENT

1. Petitioner contends (Pet. 13) that the government was required to obtain a separate court order before using pen registers in conjunction with the court authorized wire interception. Petitioner failed, however, to raise the issue prior to trial, as required by 18 U.S.C. 2518(10(a); the district court properly held that this failure was not excused,

and denied the mid-trial motion to suppress as untimely (Pet. App. 16a-17a, 19a). In any event, the contention is without merit.

In *United States* v. *Falcone*, 505 F. 2d 478 (C.A. 3), certiorari denied, 420 U.S. 955, the court concluded that the use of a pen register to decipher outgoing numbers is comprehended within an order allowing the monitoring of telephone conversations and, accordingly, that an additional pen register order is not necessary. The court explained (*id.* at 482-483):

> The reasoning for this conclusion is based on an analysis of the operation of a pen register.
>
> A telephone number is only a symbol for a series of electrical impulses. When a telephone number is dialed from a wiretapped phone, the pen register and the tape recorder are activated simultaneously. Both record the dialing of the phone. And both can be used to determine the telephone number dialed. The pen register records the electrical impulse and automatically translates it back into the number dialed. The tape recorder records the aural manifestation of the electrical impulse which also discloses, if played at a slower speed and examined by an expert, the telephone number dialed. A pen register functions to facilitate the decipherment of the number dialed. It is a mechanical refinement which translates into a different language that which has been monitored already. Simply stated, the pen register avoids a mechanical step; it translates automatically and avoids the interpreter.

Therefore, no independent order authorizing use of pen registers was necessary, because they were properly used in

conjunction with a court authorized wire interception, as the district court correctly concluded (Pet. App. 17a-18a).[1]

2. Petitioner contends (Pet. 9) that evidence derived from the wire interception should have been suppressed because inventory notice was not served within 90 days from the termination of the intercept order.

Section 2518(8)(d) of Title 18 requires that within a reasonable time, but not later than 90 days after "the termination of the period of an [intercept] order," the issuing judge shall cause the service of an inventory notice, but allows that "[o]n an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory * * * may be postponed." In the instant case, the intercept order was issued on January 15, 1973, and expired on January 30, 1973; therefore, unless postponed, the 90-day period for service of inventory would have expired on April 30, 1973 (Pet. 7). However, the government requested and was granted two postponements, which extended the time for serving inventory notice until July 16, 1973. Notice was served on petitioner and others before that date (Pet. 8). Both postponements were granted because the district

[1]There is no need to hold this case pending the decision in *United States* v. *New York Telephone Co.*, No. 76-835, certiorari granted January 25, 1977. The court order involved in that case authorized the use of pen registers only, and, although based on ample probable cause, was not submitted pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510 *et seq.* We contend that, whether or not the procedures of Title III are utilized, the telephone company may properly be required to assist in the installation of pen registers. Whether or not we are correct in this contention—and even if respondents there are correct in their assertion that orders authorizing the use of pen registers can be issued only after compliance with the procedural requirements of Title III—the use of a pen register here was a proper means of effectuating an interception authorized pursuant to Title III.

courts agreed with the government's representation that the service of notice upon the suspects at an earlier time would have frustrated the ongoing investigation (Govt. C.A. App. 41-55, 58, 62). Disruption of an "investigation [which] is still in progress" is one of the examples given in the legislative history as justification for a postponement of inventory notice. S. Rep. No. 1097, 90th Cong., 2d Sess. 105 (1968).

Petitioner's argument (Pet. 10) that Section 2518(8) (d) "imposes an absolute 90 day ceiling on inventory service" is refuted by the plain language of the statute. Moreover, the legislative history clearly demonstrates that the 90-day period was not intended to limit the discretion of the district court to grant postponements on a showing of good cause. The Senate Report recognized that in some interceptions touching on national security interests, "it might be expected that the period of postponement could be extended almost indefinitely." S. Rep. No. 1097, *supra*, at 105. While indefinite postponement was obviously not to be the rule, Congress plainly intended to give the district courts the discretion to adjust the inventory service date to the facts of each case, allowing postponement beyond the 90-day period, so long as "the principle of postuse notice [is] retained." *Ibid.* The government here was granted two extensions, because earlier notice would have frustrated the ongoing investigation. Petitioner does not claim that this reason failed to supply good cause for the postponements; indeed, he expressly concedes that in the absence of the postponements, the subsequent interceptions would have been futile (Pet. 11-12 n. 2).[2]

[2]Despite petitioner's argument to the contrary (Pet. 9-10, 11-12), suppression would not be required here even if the service of inventory notice had been late. See *United States* v. *Donovan*, No. 75-212, decided January 18, 1977, slip op. 23-24. In *Donovan*, the Court refused to comment upon the government's suggestion that "suppression might be

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1977.

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required if the agents knew before the interception that no inventory would be served." Slip op. 24, n. 26. We had noted in our brief in *Donovan* (p. 49 n. 40) that such knowledge on the part of the agents conducting the intercept "might affect the way in which the interception was conducted." Petitioner's suggestion that the Court should reach that question in this case because "the Government may well have already intended [from the outset] to request extensions to file an inventory beyond 90 days" (Pet. 12) is without merit. Contrary to the situation where the agents know from the outset that the interception will remain a secret because no inventory will be served, knowledge that inventory may be postponed could not affect the way the intercept is conducted.